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October 3, 2012

VIA HAND DELIVERY

233103

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20024

ENTERED
Office of Proceedings

OCT - 3 2012

Part of
Public Record

Re: **Finance Docket No. 35648**
Penn-Ohio Transportation, LLC—Exemption for Purchase of Lease,
Assignments of Operating Rights, and Acquisition of Leased Line —
Eastern States Railroad, LLC and Columbiana County Port
Authority

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Notice of Withdrawal of Verified Notice of Exemption of Penn-Ohio Transportation, LLC.**

One extra copy of the filing and this letter also is enclosed. I would request that you date-stamp those items to reflect your receipt of this filing and return them to me in the provided envelope.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

David M. Williamson
Attorney for Penn-Ohio Transportation, LLC

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 35648

233103

PENN-OHIO TRANSPORTATION, LLC
—EXEMPTION FOR PURCHASE OF LEASE,
ASSIGNMENTS OF OPERATING RIGHTS, AND ACQUISITION OF LEASED LINE—
EASTERN STATES RAILROAD, LLC AND
COLUMBIANA COUNTY PORT AUTHORITY

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NOTICE OF WITHDRAWAL OF VERIFIED NOTICE OF EXEMPTION

Penn-Ohio Transportation, LLC (Penn-Ohio Transportation), a wholly owned subsidiary of Tervita, LLC (Tervita), hereby voluntarily withdraws its Verified Notice of Exemption pursuant to 49 C.F.R. § 1150.31, filed July 13, 2012, relating to a short line railroad running from Youngstown, Ohio to Darlington, Pennsylvania (the Youngstown-Darlington Line). Penn-Ohio Transportation initially intended to acquire operating rights and the physical line of railroad, but due to environmental issues discovered during due diligence, the transaction will not be consummated. Accordingly, the Board may deny as moot the Petition to Revoke Exemption and Related Relief filed by Columbiana County Port Authority (CCPA) on or about September 13, 2012; however, to the extent that the Board considers CCPA's petition, it should be denied, as CCPA fails to identify any proper grounds for revocation or other relief. If the Board determines

that a formal petition for withdrawal, rather than a notice of withdrawal, is required, Penn-Ohio Transportation will respond to any direction from the Board.

I. Penn-Ohio Transportation Properly Sought a Notice of Exemption for a Contemplated Transaction

Tervita, a leading provider of waste management services in the United States and Canada, is the contract purchaser of the Penn-Ohio Landfill in Negley, Ohio, which is served by the Youngstown-Darlington Line. The Penn-Ohio Landfill has been and will likely continue to be the sole shipper on the Line. As part of the landfill acquisition, Tervita was granted contract rights to acquire the stock or assets of Eastern States Railroad, LLC (ESRR), the current lessee on the Line under a track lease with CCPA and holder of certain other trackage and easement rights. Tervita assigned its contract rights relating to ESRR to its wholly owned subsidiary, Penn-Ohio Transportation.

Tervita also entered into a letter of intent with CCPA under which Penn-Ohio Transportation would acquire the Line itself, in addition to the operating rights of ESRR.¹ Pursuant to the letter of intent, the parties anticipated closing on the railroad acquisition after completing appropriate due diligence and after receiving an acquisition exemption pursuant to 49 C.F.R. § 1150.31. Consistent with the intentions of the parties at the time, Penn-Ohio Transportation filed a verified notice of exemption (Verified Notice) on July 13, 2012, seeking an exemption covering both the acquisition of ESRR's operating rights and the CCPA sale of the Line. As CCPA correctly notes in its Petition, the Verified Notice stated:

Pursuant to 49 C.F.R. § 1150.31, *et seq.*, Penn-Ohio Transportation, LLC ("Penn-Ohio"), a non-carrier, hereby files this Verified Notice of Exemption to (1) purchase the operating and lease rights on a line running from Youngstown,

¹ A definitive contract of sale was drafted by the parties, but never executed because environmental conditions were discovered before the scheduled closing date.

Ohio to Darlington, Pennsylvania (which lease includes an agreement to acquire the leased line) of Eastern States Railroad, LLC (“ESRR”), (2) receive permanent assignments of operating rights on continuous segments of lines connected to the leased line, (3) purchase the leased line and all operating rights thereon from Columbiana County Port Authority (“CCPA”).

Of particular relevance here, the content of the Verified Notice was reviewed and approved by counsel to CCPA prior to being filed with the Board, which CCPA admits in its petition. *See* Pet. at 4 (acknowledging that “CCPA approved the wording of the Verified Notice” based on the “explicit wording”).

The exemption was granted by the Board on July 27, 2012, authorizing the parties to consummate the transaction on or after August 12, 2012. However, prior to closing on the acquisition of the Line from CCPA, Tervita uncovered in the course of due diligence significant environmental issues associated with the Line, which had not been disclosed by CCPA. As a result of the environmental complications and financial liabilities, Tervita elected not to proceed with the acquisition of the Railroad from CCPA (which it was entitled to do under the terms of the letter of intent). Tervita retains contract rights relating to the purchase of ESRR stock and is considering whether or not to exercise those rights in order to ensure that viable rail service will continue on the Line.

II. Absence of Consummation of a Transaction Does Not Retroactively Make a Verified Notice False or Misleading or Void Ab Initio

CCPA contends that the Verified Notice contains false and misleading information within the contemplation of 49 C.F.R. § 1150.31. However, CCPA fails to point to any fact or statement which was actually incorrect, misleading or even inaccurate at the time it was made. Instead, CCPA asserts that Penn-Ohio Transportation “repudiated” its intention to purchase the Railroad and “declined to consummate the proposed agreement with CCPA.” Pet. at 3. While it is true that Tervita and Penn-Ohio Transportation ultimately elected not to proceed to closing on

the railroad acquisition once the environmental conditions came to light, at the time the Verified Notice was filed the parties intended to consummate the transaction, and CCPA proffers no evidence to the contrary.² The Verified Notice accurately described the agreement that had been reached by CCPA and Tervita and the proposed schedule for consummation of the transaction, as it stood at the time of filing, as required by the Board’s regulations. *See* 49 C.F.R. § 1150.33 (requiring statement that “an agreement has been reached or details about when an agreement will be reached”); *Lassen Valley Railway LLC – Continuance in Control Exemption – Union Pacific Railroad Co.*, FD 35307 (STB served Nov. 30, 2010) (denying petition to revoke notice of exemption where provision of information required by notice exemption regulations was not false or misleading and petitioner “failed to cite anything improper in [filer’s] invocation of the notice of exemption process”).³

The mere fact that a transaction did not proceed to closing cannot retroactively alter the intention of the parties at the time, or make a statement as to intent which was true at the time

² Youngstown & Southeastern Railway Co. (YSRR), the current operator of the Line under a sub-lease with ESRR, filed a Statement in Support, which purports to describe certain elements of the agreement between Tervita and CCPA and Tervita’s supposed intentions; however, YSRR was not privy to the transaction and its speculations are inaccurate, but in any event, immaterial to the petition before the Board.

³ This case thus stands in stark contrast to those situations where a party submitted information that was not true at the time of filing, and where objections were raised during the 30-day comment period. *See, e.g., Utah Southern Railroad Company, LLC – Change in Operators Exemption – Iron Bull Railroad Company, LLC*, FD 35558 (STB served Sept. 21, 2012) (applicant misrepresented status of contract rights and consents); *see also San Francisco Bay Railroad – Mare Island – Operation Exemption – California Northern Railroad*, FD 35304 (STB served Dec. 6, 2010) (verified notice of exemption failed to mention that applicant had tried but failed to reach agreement with one of the owners of the line of railroad); *ABC & D Recycling, Inc. – Lease and Operation Exemption – A Line of Railroad in Ware, Mass.*, FD 35397 (STB served Jan. 20, 2011) (description of transaction was misleading where applicant had no lease at time of notice).

retroactively untrue or misleading based on subsequent developments. A contrary rule would set a dangerous precedent for this Board, under which sellers such as CCPA could fail to disclose significant liabilities, and intended buyers would be under pressure to close on the transaction, even though they have no contractual obligation to do so, at the risk of being found to have made false and misleading statements in a filing before a federal government agency. Such a rule would also subvert the exemption process, effectively converting it from permissive to mandatory approval, under which the party filing a verified notice would be forced to consummate the exempt transaction once a notice was filed.

CCPA also suggests that there is some impropriety to the extent that Penn-Ohio Transportation “never alerted the Board” that it would not purchase the Line from CCPA but would retain contract rights with respect to ESRR. Obviously, the reason that the Board was not “alerted” was that, at the time of the Verified Petition, the parties had intended to close on the transaction, which included both the acquisition of operating rights from ESRR and purchase of the line of railroad from CCPA. Moreover, the Verified Petition sought permissive authority to consummate – or not – the transaction described in the Verified Notice, and the transaction was accurately and fully described at the time of filing, as admitted by CCPA. As it now stands, Penn-Ohio Transportation will not acquire the Line from CCPA, and under this Board’s rules, no further action by the parties or the Board would be required even if the transaction were not consummated.

CCPA also argues, in the alternative, that “the Board is requested to reopen the proceeding.” Pet. at 4 n.1. However, as discussed above, the parties will not be consummating the acquisition of the Line, Penn-Ohio Transportation is withdrawing its notice of exemption, and thus there is no proceeding pending and no action of the Board is required or appropriate.

III. There Are No Grounds for the Board to Void a Private Contract With Respect to ESRR

CCPA also asks the Board to void the contract between Total Waste Logistics (the equity owner of ESRR) on the supposed basis that Tervita will be able to discontinue or obstruct rail service on the Youngstown-Darlington Line. CCPA also insinuates, without any evidence whatsoever, that Tervita “does not intend to provide rail service” if it were to acquire the ESRR operating rights. Tellingly, CCPA provides no basis for these accusations – to the contrary, because rail service is critical to the operation of the Penn-Ohio Landfill, Tervita is firmly committed to ensuring continued operation of the Line, whether by ESRR, CCPA or a third party. CCPA also alleges that Tervita will “impose potentially onerous terms” on a future owner of the Line, yet Tervita in fact has no ability to dictate rates or conditions of ownership to CCPA or any third party. In any event, CCPA and any new purchaser of the Line would be subject to the existing track lease and other agreements, regardless of Tervita’s rights with respect to ESRR.

In fact, CCPA has threatened to abandon the Line, which has cause Tervita serious concern. In correspondence on September 10, 2012, counsel for CCPA demanded that Tervita forfeit all its contract rights relating to ESRR on the threat that CCPA would seek abandonment of the Line if Tervita failed to accede to CCPA’s demand.⁴ Hopefully, CCPA’s counsel interposed this threat merely as a negotiating tactic rather than indicating that CCPA actually intends to proceed with abandonment, as such an intention would call into question the motivation and integrity of CCPA’s filings before this Board. As the sole shipper on the

⁴ Specifically, CCPA demanded that Tervita transfer all its contract rights to CCPA, asserting that “[t]he consideration [for Tervita forfeiting its rights] being offered by CCPA is to sell the Youngstown-Darlington Line to a qualified buyer in order to ensure future rail service to the landfill, rather than seek its abandonment.”

Youngstown-Darlington Line, Tervita has an essential interest in seeing the continued operation of the Line, and the viability of the Penn-Ohio Landfill would be seriously undermined if CCPA or a third party sought to abandon the railroad line. As noted above, Tervita does not intend to acquire operating rights in an asset purchase as originally intended, although it does retain contract rights to acquire ESRR equity. Tervita places significant value on continued rail service, and any Board intervention with respect to such agreements would potentially cause substantial financial harm by potentially leaving the Line without a viable operator. Indeed, this interest in protecting its significant investment in Ohio was the motivation for Tervita to enter into negotiations with CCPA for purchase of the Line; however, the undisclosed environmental conditions prevented Tervita from being able to assume the risks of taking ownership of the railroad property.

In light of the actual facts, CCPA's citation to AB556 (Sub-No. 2X), *Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, aff'd sub nom, Railroad Ventures, Inc. v. STB*, 299 F.3d 523 (6th Cir. 2002), is inapposite. There, the prior owner of the Youngstown-Darlington Line sought to abandon rail service, attempted to cancel the operating lease thereby terminating rail service for shippers, and attempted to sell off the railroad assets. The Board voided certain contracts for sale of the physical assets of the rail line (including certain real estate rights) that were designed to facilitate the unauthorized scrapping of the line. In sharp contrast, the status of the Youngstown-Darlington Line today is that CCPA (not Tervita) owns the line, and the Line is being operated by ESRR through a sub-contract with Youngstown & Southeastern Railway Co. There is no threat to continued service over the line, other than CCPA's recent statement that it would seek abandonment if Tervita did not yield to its demands.

To the extent that Tervita exercises its contract rights with respect to ESRR, operations will continue to be provided under the CCPA track lease and other trackage rights governing operation of the Line. CCPA cites no precedent that would allow the Board to void a notice exemption filed in good faith which was fully accurate when filed or to question private contracts relating to an operator in such circumstances. In any event, CCPA's request for relief is moot, as Penn-Ohio Transportation is voluntarily withdrawing its notice of exemption.

IV. Conclusion

In sum, Penn-Ohio Transportation is withdrawing its notice of exemption because the acquisition of the Youngstown-Darlington Line will not be consummated. The Board should deny as moot, or deny on the merits, CCPA's petition for revocation as CCPA is unable to point to any statement in the Verified Notice that is false or misleading because, in fact, the Verified Notice accurately reflected the intention of all the parties at the time it was filed. The Board should recognize this matter for what it is – a disappointed seller which had no rights to force a sale of the railroad after it failed to disclose environmental liabilities, and which is now improperly attempting to use the Board as a lever to gain advantage in a commercial transaction. Accordingly, Tervita and Penn-Ohio Transportation respectfully request that that Board approve the voluntary withdrawal of the Verified Notice and reject the relief requested by CCPA. If the Board determines that a formal petition for withdrawal, rather than a notice of withdrawal, is required, Penn-Ohio Transportation will abide by any direction from the Board and shall make such filing forthwith.

Respectfully submitted,



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Of counsel:

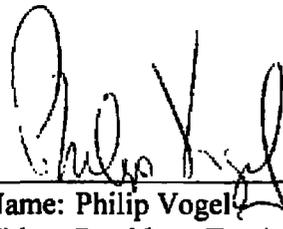
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Dated: October 3, 2012

VERIFICATION

State of Texas)
)
County of Harris) ss:

Philip Vogel, being duly sworn, deposes and says that he is President of Tervita, LLC which is the Managing Member of Penn-Ohio Transportation, LLC, that he has read the foregoing Notice of Withdrawal and knows the facts asserted therein, and that the same are true as stated.



Name: Philip Vogel
Title: President, Tervita, LLC
Managing Member
Penn-Ohio Transportation, LLC

SUBSCRIBED AND SWORN TO
before me this 2ND day
of OCTOBER, 2012

Wendy D O'Dell
Notary Public

My Commission expires: 7-19-2015

